

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MARCUS WEATHERSPOON,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:04-cv-0664-RLH-VPC

**ORDER**

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, by Marcus Weatherspoon, a Nevada prisoner. The action comes before the court with respect to its merits. The court will deny the petition.

**I. Facts and Procedural Background**

The state charged petitioner by amended information with count I, conspiracy to commit robbery, count II, burglary while in possession of a firearm, count III, robbery with the use of a deadly weapon, count IV and V, first degree kidnaping with the use of a deadly weapon, count VI and VII, discharging a firearm at or into a vehicle, count VIII, attempted murder with the use of a deadly weapon, count IX, battery with the use of a deadly weapon with substantial bodily harm, count X, battery on an officer with substantial bodily harm, count XI, conspiracy to commit robbery and/or kidnaping, count XII, first degree kidnaping, count XIII, robbery, and count XIV, grand

1 larceny auto. Exhibits 7.<sup>1</sup> Prior to trial petitioner moved to dismiss some of the counts, arguing that  
2 counts VI, VII, IX and X were multiplicitous and/or were lesser included offenses of one another and  
3 count VIII. Exhibit 5. Petitioner also filed a motion in limine to prohibit the state from introducing  
4 at trial hearsay statements of the alleged co-conspirators. Exhibit 6. The trial court denied the  
5 motions. Exhibit 1.

6 A jury trial was held between May 7, 2001 and May 15, 2001. Exhibits 8-14. The  
7 jury convicted petitioner of counts I-IV, VI-VIII, and X-XIII as charged, and convicted petitioner for  
8 count XIV of unlawful taking of a vehicle without consent, a lesser included offense. Exhibit 15.  
9 The trial court sentenced petitioner as follows: count I, a maximum term of 72 months in prison,  
10 with parole eligibility in 24 months; count II, a maximum term of 120 months in prison with parole  
11 eligibility in 36 months; count III, a maximum term of 120 months with parole eligibility in 36  
12 months along with an equal and consecutive term for the use of a deadly weapon; count IV, a life  
13 sentence with parole eligibility after 60 months, with an equal and consecutive sentence for the use  
14 of a deadly weapon; counts VI and VII, maximum terms of 72 months with parole eligibility in 24  
15 months; count VIII, a maximum term of 240 months in prison with parole eligibility in 96 months  
16 along with an equal and consecutive sentence for the use of a deadly weapon; count X, a maximum  
17 term of 96 months imprisonment with parole eligibility in 36 months; count XI, a maximum term of  
18 72 months with parole eligibility in 24 months; count XII, life in prison with parole eligibility after  
19 60 months; count XIII, a maximum term of 120 months in prison with parole eligibility in 48 months  
20 and count XIV, one year in the county jail. Exhibit 16. An amended judgment of conviction was  
21 entered on July 24, 2001. Exhibit 17.

22 Petitioner appealed, arguing (1) the evidence was insufficient to support his  
23 convictions for kidnapping, (2) his multiple convictions for the single act of shooting and injuring a  
24 police officer were redundant and impermissible, and (3) the exclusion of an African American juror

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26 <sup>1</sup> The exhibits cited in this order in the form "Exhibit \_\_\_\_," are those filed by respondents in support of their answer to the petition for a writ of habeas corpus and are located in the record at docket # 18, 19, 20, 21 and 22.

1 by the state violated *Batson*. Exhibits 18 and 19. The Nevada Supreme Court affirmed in part and  
2 reversed in part, stating the conviction for battery on an officer with substantial bodily harm was  
3 impermissibly redundant and therefore could not be upheld. Exhibit 21. The court remanded the  
4 case, instructing the lower court to enter an amended judgment of conviction. *Id.* Remittitur issued  
5 on November 7, 2002. Exhibit 22. The state trial court entered a second amended judgment of  
6 conviction on January 7, 2003 consistent with the Nevada Supreme Court's opinion. Exhibit 23.

7 On August 24, 2003, petitioner mailed his state habeas corpus petition to the district court.  
8 Exhibit 24. Petitioner alleged the following grounds: (1) his convictions for discharging a firearm  
9 should be vacated as they are redundant to the conviction for attempted murder; (2) there is  
10 insufficient evidence to support a conviction for kidnaping; (3) his rights to a fair trial were violated  
11 due to the exclusion of the only African American juror; (4) trial counsel failed to hire, consult or  
12 question a ballistics expert; (5) trial counsel failed to present evidence in support of his theory of  
13 defense; (6) trial counsel failed to object to the testimony of Tamika Beavers; (7) appellate counsel  
14 failed to argue on appeal the defense of duress; and (8) the district attorney improperly charged him  
15 with multiple offenses based on one single act. *Id.*

16 The state district court held an evidentiary hearing on January 15, 2004. Exhibit 27. After  
17 the hearing the trial court denied petitioner's claims. Exhibit 28. Petitioner appealed, and the  
18 Nevada Supreme Court affirmed the district court's denial of the claims, but remanded to correct the  
19 judgment of conviction as the court had previously reversed the conviction for count IV but the  
20 second amended judgment did not reflect the reversal. Exhibit 30. Remittitur issued on November  
21 3, 2004. Exhibit 31.

22 Petitioner mailed his federal habeas corpus petition on November 15, 2004 (docket  
23 #6). Respondents moved to dismiss four of petitioner's claims, arguing the grounds were conclusory  
24 (docket #10). This court denied the motion to dismiss (docket #16). Respondents filed an answer  
25 and petitioner filed a response to that answer (docket #17 and 23).

26 **III. Federal Habeas Corpus Standards**

1           The Antiterrorism and Effective Death Penalty Act (“AEDPA”), provides the legal  
2 standard for the Court’s consideration of this habeas petition:

3           An application for a writ of habeas corpus on behalf of a person in  
4 custody pursuant to the judgment of a State court shall not be granted  
5 with respect to any claim that was adjudicated on the merits in State court  
6 proceedings unless the adjudication of the claim --

7           (1) resulted in a decision that was contrary to, or involved an  
8 unreasonable application of, clearly established Federal law, as  
9 determined by the Supreme Court of the United States; or

10          (2) resulted in a decision that was based on an unreasonable  
11 determination of the facts in light of the evidence presented in the State  
12 court proceeding.

13 28 U.S.C. §2254(d).

14           The AEDPA “modified a federal habeas court’s role in reviewing state prisoner  
15 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are  
16 given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002). A state  
17 court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28  
18 U.S.C. § 2254, “‘if the state court applies a rule that contradicts the governing law set forth in [the  
19 Supreme Court’s] cases’” or “‘if the state court confronts a set of facts that are materially  
20 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
21 different from [the Supreme Court’s] precedent.’” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
22 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

23           A state court decision is an unreasonable application of clearly established Supreme  
24 Court precedent “‘if the state court identifies the correct governing legal principle from [the Supreme  
25 Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.’”  
26 *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause  
“requires the state court decision to be more than incorrect or erroneous”; the state court’s  
application of clearly established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529  
U.S. at 409). *See also Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004).

1 In determining whether a state court decision is contrary to, or an unreasonable  
2 application of, federal law, this Court looks to a state court's last reasoned decision. *See Ylst v.*  
3 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir.  
4 2008) (en banc).

5 Moreover, "a determination of a factual issue made by a State court shall be presumed  
6 to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness  
7 by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

#### 8 **IV. Discussion**

##### 9 **A. Ground One**

10 In his first claim for relief petitioner alleges that trial counsel failed to adequately  
11 investigate, hire, consult or cross-examine ballistics expert James Krylo, in violation of his 6th  
12 Amendment rights. Petitioner contends that had trial counsel investigated and made sure the police  
13 officer's weapon was tested, counsel would have been discovered that the police officer fired a shot  
14 at the petitioner. Petitioner states that the evidence could have been used to impeach the officer's  
15 testimony and support his theory of the case.

16 In order to prove ineffective assistance of counsel, petitioner must show (1) that  
17 counsel acted deficiently, in that his attorney made errors so serious that his actions were outside the  
18 scope of professionally competent assistance and (2) the deficient performance prejudiced the  
19 outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

20 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
21 performance of counsel resulting in prejudice, "with performance being measured against an  
22 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*  
23 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an  
24 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary  
25 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,  
26 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of

1 reasonable professional assistance. *Id.*

2           At the evidentiary hearing the state argued that the ballistics expert did not examine  
3 police officer Rossi's weapon to determine whether it had been used. Exhibit 27 at 3. Moreover, the  
4 state noted that even if the ballistics expert had examined the officer's firearm the expert would not  
5 have been able to determine when the gun had been fired, just that it had been fired at some time. *Id.*  
6 The state district court determined that counsel was not ineffective as the issue of whether the police  
7 officer had fired his gun was not material to the case. Exhibit 28. On appeal the Nevada Supreme  
8 Court affirmed the district court's denial of the claim, concluding the claim was without merit as trial  
9 counsel could not cross-examine the ballistics expert regarding whether Officer Rossi had fired his  
10 gun as the expert had not tested the gun. Exhibit 30. Moreover, the court found that the state district  
11 court's determination that the claim lacked merit was supported by substantial evidence as the  
12 firearms expert would not have been able to determine the precise time the weapon was fired. *Id.*

13           The Nevada Supreme Court's conclusion that petitioner's claim was without merit, as  
14 even if the firearm had been examined there was no prejudice to the outcome of the case, is not an  
15 objectively unreasonable application of *Strickland*. Furthermore, the state court's factual  
16 determination may not be overturned unless this court cannot "reasonably conclude that the finding  
17 is supported by the record. *Cook v. Schriro*, 516 U.S. 802, 816 (9th Cir. 2008); *Miller-El v.*  
18 *Cockrell*, 537 U.S. 32 (2003). The factual findings of the Nevada state courts are presumed correct.  
19 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada Supreme  
20 Court's decision was contrary to, or involved an unreasonable application of clearly established  
21 federal law. Moreover, there is no indication that the Nevada Supreme Court's order was  
22 unreasonable in light of the evidence presented in the state court. Ground one will be denied.

### 23           **B. Ground Two**

24           In his second claim for relief petitioner alleges that trial counsel was ineffective for  
25 failing to obtain or present testimony that would have supported his theory of defense. Specifically  
26 petitioner argues that counsel failed to obtain an affidavit of co-defendant Harris, who purportedly

1 took responsibility for committing the crimes. Petitioner also contends that counsel failed to  
2 introduce letters that were written by himself and Harris at trial. Finally petitioner asserts that trial  
3 counsel failed to call Gloria Banks as a witness.

4 **1. Failure to Obtain or Introduce Affidavit of Co-Defendant Harris**

5 In claim 2(A) claim petitioner argues that trial counsel failed to obtain an affidavit  
6 from his co-defendant, Harris, admitting responsibility for the crimes. Petitioner alleges that Harris  
7 took fully responsibility for all the crimes committed but was unwilling to testify at trial because his  
8 own trial was still pending. Petitioner contends that had counsel obtained this affidavit, the jury  
9 would have heard that Harris and co-defendant Winn forced petitioner to participate in the crimes by  
10 threatening him and his family.

11 At the evidentiary hearing defense trial counsel Amesbury and the state told the court  
12 that such an affidavit would have been hearsay as co-defendant Harris did not testify at petitioner's  
13 trial. Exhibit 27. The state district court agreed, and denied the claim, stating that any affidavit of  
14 Harris would not have been admissible at trial. Exhibit 28. The Nevada Supreme Court affirmed the  
15 denial of this claim, finding that counsel Amesbury's belief that Harris's affidavit would be  
16 inadmissible hearsay was not unreasonable. Exhibit 30. Furthermore, the court noted that co-  
17 defendant Winn did testify that Harris forced petitioner to participate in the crimes, therefore  
18 petitioner could not demonstrate that the outcome of trial would have been different. *Id.*

19 Petitioner has not met his burden of proving that the Nevada Supreme Court's  
20 determination that no prejudice resulted to the outcome of the trial was an objectively unreasonable  
21 application of *Strickland*. Moreover, the Nevada Supreme Court's order is not an unreasonable  
22 determination in light of the evidence produced in the state court proceeding. 28 U.S.C. §  
23 2254(d)(2), (e)(1) (presuming state court findings are correct unless this presumption is refuted by  
24 clear and convincing evidence). As the petitioner has not shown that trial counsel's failure to have  
25 the hearsay affidavit presented to the jury prejudiced the trial, ground 2(A) will be denied.

26 **2. Failure to Introduce Petitioner's and Co-Defendant's Letters**

1 In claim 2(B) petitioner alleges that trial counsel was ineffective for failing to  
2 introduce at trial letters he wrote to co-defendant Harris asking Harris not to harm him or his family.  
3 Petitioner asserts that these letters would have assisted in proving that he was forced to commit the  
4 crimes due to his fear of Harris.

5 At the evidentiary hearing counsel Amesbury stated that the letters would have  
6 prejudiced petitioner's case as they were inflammatory and contained admissions. Exhibit 27.  
7 Moreover, trial counsel told the court he thought petitioner was asking Harris, in the letters, not to  
8 testify against him at trial. *Id.* Petitioner told the district court that the letters did not contain  
9 admissions and could have been used to show that he was afraid Harris would hurt him. *Id.* The trial  
10 court concluded that trial counsel was not ineffective. Exhibit 28. The Nevada Supreme Court  
11 affirmed the lower court determination, noting that counsel did not act unreasonably in failing to  
12 have the letters introduced into evidence. Exhibit 30.

13 The United States Supreme Court has noted that "strategic choices made after  
14 thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."  
15 *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). The Nevada Supreme Court's decision that  
16 counsel's strategic decision to not introduce the letters as they were more harmful than helpful to the  
17 defense is not an unreasonable application of federal law. Ground 2(B) will be denied.

### 18 **3. Failure to Call Gloria Banks as a Witness**

19 In claim 5(C) petitioner argues that trial counsel failed to call Gloria Banks as a  
20 witness. Petitioner states that Banks was the mother of co-defendant Winn, and knew of Harris's  
21 violent nature. Petitioner contends that her testimony would have corroborated his theory of the  
22 case, namely that he was forced to help Harris after being threatened. The trial court denied the  
23 claim, stating that petitioner had failed to identify who Banks was and what she would testify to.  
24 Exhibit 28. On appeal the Nevada Supreme Court affirmed the denial, finding that defense counsel  
25 Amesbury had testified at the hearing that he did not call Banks because he did not believe her  
26 testimony would have aided in the defense. Exhibit 30. The court concluded that petitioner had

1 failed to show that counsel acted ineffectively. *Id.*

2 As was noted above, strategic decisions after investigating the law and facts are  
3 unchallengeable. *Strickland*, 466 U.S. at 690-91. Trial counsel testified that he investigated Banks  
4 as a witness and made the determination that she would not help the defense. Exhibit 27. The  
5 Nevada Supreme Court's order on this claim is not unreasonable in light of the evidence produced at  
6 the state court proceeding. 28 U.S.C. § 2254(d)(2), (e)(1). There is no indication that the state court  
7 unreasonably applied federal law. Ground 5(C) will be denied.

### 8 **C. Ground Three**

9 Petitioner argues in his third claim that trial counsel was ineffective for failing to  
10 object to the testimony of Tamika Beavers. Petitioner states that Beavers changed her statement  
11 after negotiating with the state and receiving a reduced sentence for her testimony.

12 During the evidentiary hearing defense trial counsel told the district court that he did  
13 not have a reason to object to Beavers' testimony. Exhibit 27. The district court stated that while  
14 Beavers changed her statement, that was an issue of credibility for the jury to determine and not a  
15 basis to prevent Beavers from testifying. *Id.* The court also noted in its order that trial counsel  
16 properly drew attention to Beavers bias during the trial. Exhibit 28. The Nevada Supreme Court  
17 affirmed the denial of this claim, first noting that Beavers was extensively cross-examined by  
18 defense counsel regarding her agreement with the state. Exhibit 30. Moreover, the court found that  
19 petitioner had not articulated any valid bases on which counsel should have objected to the  
20 testimony. *Id.* The court concluded that trial counsel was not ineffective. *Id.*

21 The Nevada Supreme Court's decision is not an objectively unreasonable application  
22 of *Strickland*. Petitioner failed to show that trial counsel was ineffective light of *Strickland*, as  
23 petitioner has not shown that counsel had a valid basis to object to Beavers' testimony. Moreover,  
24 petitioner's claim is belied by the record. Trial counsel did move to prevent testimony from the co-  
25 conspirators or co-defendants in the case, and the trial court denied that motion. Exhibit 6. Ground  
26 three will be denied.

1                   **D. Ground Four**

2                   In his fourth claim for relief petitioner argues that appellate counsel was ineffective  
3 for failing to submit the ground or argument of duress (that he was forced to commit the crimes) on  
4 appeal. “Claims of ineffective assistance of appellate counsel are reviewed according to the standard  
5 announced in *Strickland*.” *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002).

6                   Defense counsel told the state district court that he did not believe this was an  
7 appealable issue. Exhibit 27. Counsel further stated that the defense of duress was a question of fact  
8 for the jury to determine, and the jury did not believe this defense. *Id.* The district court determined  
9 that the issue did not have a reasonable probability of success on appeal. Exhibit 28. The Nevada  
10 Supreme Court affirmed the denial, noting that petitioner’s claim was without merit. Exhibit 30.  
11 The court stated that petitioner testified at trial that he was forced to commit the crimes but the jury  
12 did not believe the defense. *Id.* The court concluded there was not a reasonable probability that the  
13 issue would have succeeded had counsel raised it on appeal.

14                   The Nevada Supreme Court’s finding that there was no reasonable probability of  
15 success had the issue been raised on appeal is not objectively unreasonable, and is also entitled to a  
16 presumption of correctness. 28 U.S.C. § 2254(e)(1). Petitioner has not demonstrated prejudice as is  
17 required under *Strickland*. The state court’s ruling was not contrary to, or an unreasonable  
18 application of, clearly established federal law, as determined by the United States Supreme Court.  
19 The court will deny ground four.

20                   **E. Grounds Five, Six and Seven**

21                   In his fifth claim petitioner alleges that his due process rights were denied when he  
22 was charged with multiple offenses for one single act. Specifically petitioner argues that counts VI,  
23 VII and IX were lesser included offenses of count VIII, and should have been dismissed along with  
24 count X. In ground six petitioner contends that there was insufficient evidence to support the  
25 conviction for kidnaping, as the movement of victim Davis was incidental to the theft of the vehicle.  
26 In his seventh ground for relief petitioner asserts that the state’s exclusion of the only African

1 American juror violated his Fourteenth Amendment rights.

2           Petitioner raised these same claims on direct appeal. The Nevada Supreme Court  
3 determined that the charge of battery on an officer with substantial bodily harm was impermissibly  
4 redundant and reversed and remanded for the conviction for that count to be overturned. Exhibit 21.  
5 Moreover the court found that sufficient evidence did exist to support the conviction for kidnaping  
6 victim Davis, as petitioner forced the victim into the car instead of only taking the vehicle, therefore  
7 the movement of the victim was not incidental to the theft of the vehicle. *Id.* Finally, the court  
8 determined that the district court did not err in determining that the prosecution had not committed a  
9 *Batson* violation when excluding an African American juror as the prosecutor had articulated race-  
10 neutral reasons for excluding the juror. *Id.*

11           Petitioner then reargued these claims in his state habeas petition. The district court found  
12 the claims to be barred by the law of the case doctrine as the issues were previously decided on direct  
13 appeal. Exhibit 28. The Nevada Supreme Court affirmed the denial of these claims, stating that the  
14 district court did not err in denying the claims as the court has previously considered the merits of  
15 the claims on direct appeal. Exhibit 30. The court concluded that it was barred from considering the  
16 claims due to the law of the case doctrine. *Id.*

17           A court is precluded from “reexamining an issue” that was “previously decided by the  
18 same court, or a higher court, in the same case.” *Hydrick v. Hunter*, 500 F.3d 978, 986 (9th Cir.  
19 2007) (citing *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988)). The Nevada Supreme  
20 Court’s determination that it was barred from reevaluating claims five, six and seven as they had  
21 already been considered on the merits previously is not an objectively unreasonable application of  
22 federal law. Grounds five, six and seven will be denied.

## 23 **V. Certificate of Appealability**

24           In order to proceed with an appeal from this court, petitioner must receive a certificate  
25 of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make “a substantial showing  
26 of the denial of a constitutional right” to warrant a certificate of appealability. *Id.* The Supreme

1 Court has held that a petitioner “must demonstrate that reasonable jurists would find the district  
2 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.  
3 473, 484 (2000).

4 The Supreme Court further illuminated the standard for issuance of a certificate of  
5 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

6 We do not require petitioner to prove, before the issuance of a COA, that  
7 some jurists would grant the petition for habeas corpus. Indeed, a claim  
8 can be debatable even though every jurist of reason might agree, after the  
9 COA has been granted and the case has received full consideration, that  
10 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court  
has rejected the constitutional claims on the merits, the showing required  
to satisfy § 2253(c) is straightforward: The petitioner must demonstrate  
that reasonable jurists would find the district court’s assessment of the  
constitutional claims debatable or wrong.”

11 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

12 The court has considered the issues raised by petitioner, with respect to whether they  
13 satisfy the standard for issuance of a certificate of appeal, and the court determines that none meet  
14 that standard. The court will therefore deny petitioner a certificate of appealability. Accordingly, the  
15 court will deny petitioner a certificate of appealability.

16 **IT IS THEREFORE ORDERED** that the petition for a writ of habeas corpus  
17 (docket #6) is **DENIED**.

18 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**  
19 **ACCORDINGLY**.

20 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
21 **APPEALABILITY**.

22  
23 Dated this 12<sup>th</sup> day of June, 2008.

24  
25   
26 CHIEF UNITED STATES DISTRICT JUDGE